

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RAYMOND ROTHROCK,

Plaintiff,

Case No. 15-cv-2412 DMS (JLB)

V

INTERNATIONAL ASSOCIATION
OF HEAT AND FROST
INSULATORS AND ALLIED
WORKERS et al.

Defendants.

ORDER GRANTING IN PART DEFENDANTS' MOTION TO IMPOSE SANCTIONS

[ECF No. 33]

Presently before the Court is Defendants' motion to impose Rule 37 sanctions against Plaintiff for his failure to timely serve his initial disclosures.¹ (ECF No. 33.) Also before the Court are four attorney declarations filed by Defendants in support of their motion to impose sanctions against Plaintiff (ECF Nos. 46–49) and Plaintiff's declaration filed in opposition to Defendants' motion (ECF No. 55).

¹ Defendants' motion was filed originally as a motion to compel Plaintiff's initial disclosures and to impose Rule 37 sanctions against Plaintiff. (ECF No. 33.) On August 5, 2016, the Court granted Defendants' motion to compel Plaintiff's initial disclosures but refrained from ruling on Defendants' motion to impose sanctions until after a hearing was held on the matter. (See ECF No. 44.) Thus, only Defendants' motion to impose sanctions remains pending before the Court.

1 **I. BACKGROUND**

2 Plaintiff filed this disability discrimination case against Defendants in the San Diego
 3 Superior Court on August 19, 2015. (ECF No. 1-2 at 3.) The case was removed to this
 4 Court on October 26, 2015. (ECF No. 1.) On January 21, 2016, the Honorable Dana M.
 5 Sabraw granted Plaintiff's motion for appointment of pro bono counsel and appointed
 6 Victor Huerta, of the Law Offices of Victor Huerta, as Plaintiff's counsel. (ECF No. 11.)

7 On April 12, 2016, this Court issued a Notice and Order: (1) For Early Neutral
 8 Evaluation Conference, (2) Setting Rule 26 Compliance and Case Management
 9 Conference, which required the parties to exchange their initial disclosures by May 10,
 10 2016. (ECF No. 22 at 4.) Defendants timely served their initial disclosures on Plaintiff;
 11 however, Plaintiff did not timely serve his initial disclosures on Defendants. (ECF No. 33-
 12 1 at 2.)

13 On May 13, 2016, the parties filed a Joint Discovery Plan that represented that
 14 "Plaintiff w[ould] file an unopposed *ex parte* application for an extension of time to make
 15 his initial disclosures to Defendants on May 16, 2016," and that Plaintiff
 16 "expect[ed] to make his initial disclosures on or before May 24, 2016." (ECF No. 23 at 2.)
 17 However, Plaintiff neither requested an extension of time to serve his initial disclosures
 18 nor served his initial disclosures on Defendants by these dates. (ECF No. 33-1 at 2.) In
 19 addition, Plaintiff's former counsel,² Victor Huerta, represented to Defendants' counsel
 20 that he was unable to induce Plaintiff to agree to serve his initial disclosures on Defendants.
 21 (*Id.*)

22 On June 22, 2016, Defendants filed the present motion requesting that the Court:
 23 (1) compel Plaintiff to serve his initial disclosures; and (2) impose sanctions against
 24 Plaintiff under Federal Rule of Civil Procedure 37(a) for his failure to timely serve the

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 27 ² Mr. Huerta filed a motion for leave to withdraw as attorney of record for Plaintiff on June 15,
 28 2016. (ECF No. 32.) The Honorable Dana M. Sabraw granted Mr. Huerta's motion on July 18, 2016.
 (ECF No. 36.)

1 disclosures. (ECF No. 33.) On August 5, 2016, the Court granted Defendants' motion
 2 with respect to their request that Plaintiff be required to serve his initial disclosures. (ECF
 3 No. 44 at 3–4.) With respect to Defendants' request that the Court impose sanctions against
 4 Plaintiff, the Court's August 5, 2016 Order set further briefing requirements and an in-
 5 person hearing on the matter. (*Id.* at 4–5.) On August 10, 2016, Defendants filed four
 6 attorney declarations in support of their motion to impose sanctions (ECF Nos. 46–49), and
 7 on August 19, 2016, Plaintiff filed an opposition to Defendants' motion (ECF No. 55).

8 A hearing on Defendants' motion to impose sanctions was held on August 23, 2016.
 9 (ECF No. 56.) Attorneys D. William Heine and Christopher Conte appeared on behalf of
 10 Defendants. (*Id.*) Plaintiff did not appear. (*Id.*) In light of Plaintiff's failure to appear at
 11 the hearing, the Court declined to substantively address Defendants' motion and took the
 12 matter under submission for determination on the papers. (*Id.*) For the reasons discussed
 13 below, the Court **GRANTS in part** Defendants' motion to impose sanctions. (ECF No.
 14 33.)

15 **II. DISCUSSION**

16 Federal Rule of Civil Procedure 37(a)(5)(A) provides that if the court grants a motion
 17 to compel discovery, it "must" order the non-moving party to pay the moving party's
 18 "reasonable expenses incurred in making the motion, including attorney's fees." Fed. R.
 19 Civ. P. 37(a)(5)(A). However, the Rule recognizes various exceptions, such as where the
 20 court finds the non-moving party's nondisclosure, response, or objection was substantially
 21 justified or other circumstances make an award of expenses unjust."³ *Id.*

22 **A. Rule 37 Sanctions are Appropriate**

23 After reviewing the parties' moving papers and supporting documents, the Court
 24 concludes that an award of Defendants' reasonable fees and expenses under Rule 37 is
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27 ³ A third exception that is not applicable here is where "the movant filed the motion before
 28 attempting in good faith to obtain the disclosure or discovery without court action." Fed. R. Civ. P.
 37(a)(5)(A)(i).

1 warranted. Plaintiff was ordered to serve his initial disclosures by May 10, 2016. (ECF
2 No. 22.) Plaintiff did not make his disclosures until August 17, 2016 (ECF No. 55 at 1),
3 over three months after he was initially ordered to do so, and only after being ordered to
4 do so by the Court for a second time. (*See* ECF No. 44.) While Plaintiff argues that his
5 failure to timely serve his initial disclosures was justified because he “was unaware” of his
6 former counsel’s communications with Defendants (ECF No. 55 at 3), the Court is
7 unpersuaded. The declaration that Mr. Huerta filed in support of his motion to withdraw
8 as Plaintiff’s counsel (ECF No. 32), which Defendants re-filed in support of the instant
9 motion to impose sanctions (ECF No. 35-1), makes clear that Plaintiff actively ignored and
10 rejected Mr. Huerta’s repeated efforts to discuss the service of Plaintiff’s initial disclosures.
11 (*See* ECF No. 35-1 at 3–5.) Thus, any claim that Plaintiff was unaware of his former
12 counsel’s communications with Defendants’ counsel, or of his requirement to exchange
13 initial disclosures with Defendants, was the result of Plaintiff’s own refusal to
14 communicate with his former attorney. For this reason, the Court finds Plaintiff’s failure
15 to timely disclose his initial disclosures was not substantially justified.

16 Plaintiff raises several objections to Defendants’ motion to impose sanctions in his
17 opposing declaration (*see* ECF No. 55); however, the Court finds all of Plaintiff’s
18 objections are without merit. First, Plaintiff argues Defendants’ motion should be denied
19 because Defendants failed to comply with an alleged meet and confer requirement before
20 filing their second Rule 12(b) motion to dismiss. (ECF No. 55 at 3.) As Plaintiff fails to
21 demonstrate how Defendants’ failure to meet and confer regarding the motion to dismiss
22 prevented Plaintiff from timely serving his initial disclosures on Defendants, the Court
23 finds this objection groundless.

24 Second, Plaintiff argues that Defendants’ motion should be denied because certain
25 proofs of service list an incorrect e-mail address for Plaintiff. (ECF No. 55 at 3–4.)
26 However, Plaintiff failed to identify the particular proofs of service with which he takes
27 issue. To the extent Plaintiff is referencing a proof of service attached to Defendants’ May
28 20, 2016 motion to dismiss, this document would not have been served on Plaintiff

1 personally because he was represented by counsel at that time.⁴ And, in any event, whether
 2 Plaintiff was properly served with Defendants' motion to dismiss has no bearing on his
 3 failure to timely serve his initial disclosures. To the extent Plaintiff is referencing the
 4 proofs of service attached to the attorney declarations filed in support of Defendants'
 5 motion to impose sanctions, the proofs of service reflect that the declarations were served
 6 on Plaintiff not only via e-mail but also via U.S. mail. (ECF No. 46 at 4; ECF No. 47 at 6;
 7 ECF No. 48 at 4; ECF No. 49 at 4.) In addition, the declarations of attorneys Heine,
 8 Kurnick, and Steiner were re-sent to Plaintiff's correct e-mail address the same day they
 9 were filed with the Court. (See ECF Nos. 50–52.) Therefore, any claim that Defendants'
 10 motion to impose sanctions should be denied on the ground that certain proofs of service
 11 listed Plaintiff's incorrect e-mail address is baseless.

12 Third, Plaintiff argues that Defendants' motion should be denied because "there is
 13 no identifiable information [in Mr. Conte's declaration] showing that Mr. Conte's costs
 14 were a direct result or associated with representing his client 'Heat & Frost Insulators.'" (ECF No. 55 at 4.) The Court finds Plaintiff's objections regarding Mr. Conte's declaration
 15 unpersuasive. Mr. Conte explains in his sworn declaration that the excerpted billing
 16 statement attached to his declaration is a true and correct statement that reflects the work
 17 he performed on Defendants' motion to compel in this case. (ECF No. 46 at 2.)

18 Finally, Plaintiff argues that Defendants' motion should be denied because
 19 Defendants' counsels' billing entries with respect to joint attorney phone calls, e-mails,
 20 and meet and confers are not identical. (ECF No. 55 at 4–5.) For example, Plaintiff argues
 21 that "Mr. Heine reports phone and Memo costs with one or both Attorneys only there's no
 22 reciprocal charges from attorneys contacted." (*Id.* at 5.) While it appears Plaintiff is correct
 23 that the billing entries filed by Attorney Heine contain more entries of joint attorney phone
 24 calls, e-mails, and other conferences than those filed by Attorneys Conte and Kurnick, the
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 28 ⁴ Victor Huerta's motion to withdraw as counsel was not granted until July 18, 2016. (ECF No.
 36.)

1 Court finds that this is not a sufficient reason to deny Defendants' motion to impose
 2 sanctions. To the extent that Attorneys Conte and Kurnick participated in a joint attorney
 3 phone and e-mail conferences but chose not to charge their clients for these activities, that
 4 is their prerogative.

5 For the reasons above, the Court concludes that Plaintiff's objections to Defendants'
 6 motion to impose sanctions do not constitute "other circumstances [that would] make an
 7 award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A)(iii). Accordingly, an award of
 8 Defendants' reasonable attorneys' fees and expenses under Rule 37 is appropriate.

9 **B. Defendants' Attorneys' Fees Are Not Reasonable and Must Be Reduced**

10 Reasonable attorney's fees are determined by applying the "lodestar" calculation set
 11 forth in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). *Chaudhry v. City of Los Angeles*,
 12 751 F.3d 1096, 1110 (9th Cir. 2014). Under the lodestar method, a reasonable fee is
 13 determined by multiplying an attorney's reasonable hourly rate by the number of hours
 14 reasonably expended on the litigation. *Id.* (citing *Hensley*, 461 U.S. at 433). The district
 15 court has discretion to determine what fees are reasonable and the authority to adjust the
 16 lodestar amount. *Id.* (citing *Hensley*, 461 U.S. at 433–34).

17 1. Reasonable Hourly Rates

18 A reasonable hourly billing rate is one that is "in line with those prevailing in the
 19 community for similar services by lawyers of reasonably comparable skill, experience and
 20 reputation." *Chaudhry*, 751 F.3d at 1110 (citing *Camacho v. Bridgeport Fin., Inc.*, 523
 21 F.3d 973, 980 (9th Cir. 2008)). The relevant community is the forum in which the district
 22 court sits. *Id.* (citing *Camacho*, 523 F.3d at 979). Affidavits of the moving party's
 23 attorneys and other attorneys regarding prevailing attorneys' fees in the community are
 24 satisfactory evidence of the prevailing market rate. *Id.* (quoting *United Steelworkers of*
 25 *Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990)). Once the moving party
 26 presents this evidence, the nonmoving party has the burden of rebuttal, which requires the
 27 submission of evidence challenging the accuracy and reasonableness of the facts asserted
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1 by the moving party in its submitted affidavits. *Id.* at 1110–11 (citing *Camacho*, 523 F.3d
 2 at 980).

3 In support of Defendants' motion to impose sanctions, each of Defendants' attorneys
 4 submitted a declaration attesting to his experience, skill, and hourly billing rate in this case.
 5 (ECF Nos. 46–48.) The hourly billing rates of Defendants' counsel ranged from \$135 to
 6 \$235. (*Id.*) In addition, Defendants filed the declaration of Attorney Fern M. Steiner, an
 7 attorney who does not have an interest in this case, attesting to the reasonableness of
 8 Defendants' counsels' hourly billing rates. (ECF No. 49.) The court finds Defendants
 9 have met their burden of establishing their counsels' requested hourly billing rates are
 10 comparable to those prevailing in the San Diego community for similar services. Plaintiff
 11 provides no evidence to the contrary. Accordingly, the Court concludes that Defendants'
 12 counsels' hourly billing rates are reasonable.

13 2. Reasonable Time Spent

14 In addition to evidence supporting the reasonableness of hourly billing rates claimed,
 15 a party seeking an award of fees should submit evidence supporting the hours worked.
 16 *Conboy v. Wynn Las Vegas, LLC*, No. 2:11-cv-01649-JCM-CWH, 2012 WL 6100313, at
 17 *3 (D. Nev. Dec. 7, 2012) (citing *Hensley*, 461 U.S. at 433). District courts have discretion
 18 to reduce the number of hours that were not reasonably expended. *Id.* (citing *Hensley*, 461
 19 U.S. at 433–34); *see also Gates v. Deukmejian*, 987 F.2d 1392, 1399 (9th Cir. 1992).
 20 Where a district court imposes a reduction in fees, the court should provide a “concise but
 21 clear” explanation of its reasoning. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112
 22 (9th Cir. 2008) (citing *Hensley*, 461 U.S. at 437).

23 Defendants' counsel seek a total of \$9,568.32 in fees and expenses for over 40 hours
 24 of work performed in relation to Defendants' motion to compel and motion to impose
 25 sanctions. (See ECF Nos. 46–48.) As discussed in greater detail below, after reviewing
 26 the itemizations and descriptions of the work performed by Defendants' counsel, the Court
 27 concludes that the amount of fees Defendants seek is unreasonable given the
 28 uncomplicated nature of the underlying discovery dispute.

1 *i. Attorney Conte*

2 Attorney Conte, who represents Defendant Heat & Frost Insulators & Allied
3 Workers, Local 5 (sued as Asbestos Workers Local 5), asserts that he spent a total of 0.9
4 hour on activities related to Defendants' motion to compel. (See ECF No. 46 at 2.)
5 Specifically, he spent 0.5 hour reviewing a draft of the motion and 0.1 hour e-mailing his
6 comments on the draft motion to co-counsel. (*Id.*) In addition, Attorney Conte spent 0.3
7 hour preparing his declaration in support of Defendants' motion to impose sanctions. (*Id.*)
8 At an hourly billing rate of \$150, Attorney Conte seeks a total of \$135 in fees incurred in
9 relation to Defendants' motion to compel. (See *id.*) The Court concludes that the total fee
10 amount Attorney Conte seeks is reasonable.

11 *ii. Attorney Kurnick*

12 Attorney Kurnick, who represents Defendant International Association of Heat and
13 Frost Insulators and Allied Workers, asserts that he spent a total of 21.1 hours on work
14 related to Defendants' motion to compel and motion to impose sanctions. (See ECF No.
15 47 at 5.) Specifically, with respect to Defendants' motion to compel, Attorney Kurnick
16 spent approximately 0.9 hour meeting and conferring with opposing counsel and co-
17 counsel regarding the service of Plaintiff's initial disclosures, 0.45 hour reviewing the
18 Court's order setting the briefing schedule for the motion and the undersigned's Chambers
19 Rules, 3 hours conducting legal research related to the motion, 5.8 hours drafting the
20 motion, 2.7 hours reviewing and revising the motion, and 0.4 hour e-mailing co-counsel
21 about the motion. (ECF No. 47-2 at 2.) In addition, Attorney Kurnick incurred \$21.07 in
22 LexisNexis charges while performing legal research related to Defendants' motion to
23 compel. (ECF No. 47-3 at 2.)

24 With respect to the declaration Attorney Kurnick filed in support of Defendants'
25 motion to impose sanctions, he spent approximately 0.3 hour reviewing the Court's order
26 setting forth the briefing requirements for the declaration, 3 hours conducting legal research
27 related to the declaration, 0.5 hour reviewing his billing records, 3.5 hours preparing the
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1 declaration, and 0.2 hour conferring telephonically with co-counsel about the attorney
 2 declarations. (ECF No. 47-4 at 2.)

3 In addition, on August 1, 2016, Attorney Kurnick spent 0.5 hour conducting
 4 “[t]elephone conferences with attorney Bill Heine,” 0.2 hour “[r]eview[ing] court’s order
 5 on hearing,” and 0.7 hour “[r]eview[ing] Rothrock’s response to motion to dismiss [sic]
 6 and draft[ing] reply.” (*Id.*)

7 At an hourly billing rate of \$235, Attorney Kurnick seeks a total award of \$5,193.50
 8 in incurred fees and expenses. (ECF No. 47 at 5.) For the following reasons, the Court
 9 concludes that the total fee amount Attorney Kurnick seeks is unreasonable.

10 First, the Court’s Local Rules require opposing counsel to meet and confer
 11 concerning all disputed issues prior to bringing any discovery motion before the Court.
 12 CivLR 26.1.a. As such, hours spent meeting and conferring generally should not be
 13 included in an attorneys’ fees award. *See Matlink, Inc. v. Home Depot U.S.A., Inc.*, No.
 14 07cv1994-DMS (BLM), 2008 WL 8504767, at *5 (S.D. Cal. Oct. 27, 2008). Because
 15 Attorney Kurnick would have incurred the fees associated with his meet and confer efforts
 16 regardless of whether Defendants were required to bring their motion to compel, the Court
 17 declines to award any of Attorney Kurnick’s fees incurred while meeting and conferring
 18 about Plaintiff’s initial disclosures.

19 Second, in light of the brevity of Defendants’ motion to compel and the straight-
 20 forward nature of the underlying discovery dispute, the Court concludes that the time
 21 Attorney Kurnick spent researching (3 hours), drafting (5.8 hours), and reviewing and
 22 revising (2.7 hours) the motion is excessive. Defendants’ motion was not a complex
 23 discovery motion. The four-page document, which cites to a single case and only two
 24 Federal Rules of Civil Procedure, sought to compel the production of a single routine
 25 category of documents, Plaintiff’s initial disclosures. (*See* ECF No. 33.) Given these facts,
 26 the Court concludes that it was reasonable for Attorney Kurnick to have spent 1.5 hours
 27 conducting legal research, 3 hours drafting the motion, and 1.5 hours reviewing and
 28 revising the motion.

1 Third, the Court concludes that the time Attorney Kurnick spent researching (3
 2 hours) and preparing (3.5 hours) his declaration in support of Defendants' motion to
 3 impose sanctions is also excessive. The three-and-one-half-page declaration is comprised
 4 mostly of information that is personal and readily available to Attorney Kurnick. Attorney
 5 Conte reported preparing a similar, but notably shorter, declaration in 18 minutes. (ECF
 6 No. 46 at 2.) In addition, while Attorney Kurnick's declaration provides a full page of case
 7 summaries in support of the reasonableness of his billing rate, the Court finds these cases
 8 could have been located and reviewed in a short amount of time. Accordingly, the Court
 9 concludes that it was reasonable for Attorney Kurnick to have spent 1 hour conducting
 10 legal research related to, and 2.5 hours preparing, his declaration.

11 Fourth, the Court concludes that the 1.4 hours of work Attorney Kurnick performed
 12 on August 1, 2016, must be excluded from a Rule 37(a) award of attorney's fees. One of
 13 Attorney Kurnick's billing entries specifically references Defendants' motion to dismiss,
 14 and the docket reflects that the Court's "order on hearing" that Attorney Kurnick reviewed
 15 refers to the Honorable Dana M. Sabraw's order vacating the August 5, 2016 hearing on
 16 Defendants' motions to dismiss and for judgment on the pleadings. (*See* ECF No. 42.)
 17 Further, as the undersigned did not issue her initial order on Defendants' motion to compel
 18 and motion to impose sanctions until August 5, 2016 (ECF No. 44), any work performed
 19 by Defendants' counsel prior to that date would not likely have been related to these
 20 particular motions. Thus, as the work Attorney Kurnick performed on August 1, 2016, was
 21 not clearly related to Defendants' motion to compel, the Court declines to award Attorney
 22 Kurnick his fees incurred on this date.

23 In sum, the Court finds it was reasonable for Attorney Kurnick to have spent 11.35
 24 hours on tasks related to Defendants' motion to compel and motion to impose sanctions.
 25 Accordingly, the Court finds reasonable an award to Attorney Kurnick of \$2,667.25 in
 26 incurred fees and \$21.07 in incurred expenses.

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1 *iii. Attorney Heine*

2 Attorney Heine, who represents Defendant International Association of Heat and
 3 Frost Insulators and Allied Workers, asserts that he spent a total of 18.75⁵ hours on
 4 activities related to Defendants' motion to compel. (*See* ECF No. 48 at 3.) Specifically,
 5 with respect to Defendants' motion to compel, Attorney Heine spent approximately⁶ 7
 6 hours meeting and conferring with opposing counsel and his co-counsel with respect to
 7 Plaintiff's initial disclosures, 0.25 hour reviewing the Court's order setting the briefing
 8 schedule for the motion, 0.55 hour reviewing the Court's Local Rules, 3 hours reviewing,
 9 revising, and formatting the motion, and 1.9 hours conferring with co-counsel by e-mail
 10 and phone. (*See* ECF No. 48-1 at 2-4.)

11 With respect to the declaration Attorney Heine filed in support of Defendants'
 12 motion to impose sanctions, he spent approximately 0.2 hour reviewing the Court's order
 13 setting forth the briefing requirements for the declaration, 0.3 hour calendaring the filing
 14 deadline and updating his case file, 0.3 hour reviewing and inquiring into certain cases,
 15 0.75 hour reviewing and revising his hours and fees report, 1.3 hours drafting the
 16 declaration, 0.65 hour reviewing Attorneys Conte's, Kurnick's, and Steiner's declarations,
 17 and 2.25 hours conferring with co-counsel about the attorney declarations by e-mail and
 18 phone. (*Id.*)

19 In addition, on August 9, 2015 [sic], Attorney Heine spent 1.25 hours "[d]raft[ing]
 20 Heine declaration in support of motion for sanctions; review[ing] file re San Diego
 21 Convention Center case." (*Id.* at 4.)

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24 ⁵ While Attorney Heine's declaration states that he spent 18.75 hours on tasks related to
 25 Defendants' motion to compel (ECF No. 48 at 3), the Court notes that the billing statement attached as
 26 Exhibit A to Attorney Heine's declaration contains billing entries for 19.75 hours of work. (*See* ECF No.
 27 48-1 at 2-4.)

28 ⁶ Mr. Heine often grouped multiple tasks into a single billing entry. Where it seemed logical to do
 29 so, the Court estimated Mr. Heine's time spent on each specific task included in the entry by first dividing
 30 the total time billed by the total number of tasks performed within that time and then distributing equal
 31 portions of time to each task performed.

1 At an hourly billing rate of \$225, Attorney Heine seeks a total award of \$4,218.75
 2 in incurred fees. (ECF No. 48 at 3.) For the following reasons, the Court concludes that
 3 the total fee amount Attorney Heine seeks is unreasonable.

4 First, for the reasons stated above, the Court declines to award any of Attorney
 5 Heine's fees incurred while meeting and conferring regarding Plaintiff's initial disclosures.

6 Second, in light of the brevity of Defendants' motion and the uncomplicated nature
 7 of the underlying discovery dispute, the Court concludes that the 3 hours Attorney Heine
 8 spent reviewing, revising, and formatting Defendants' motion to compel is excessive. For
 9 the reasons stated above, the Court concludes that it was reasonable for Attorney Heine to
 10 have spent 1.5 hours on this task.

11 Third, the Court concludes that the time Attorney Heine spent conferring with co-
 12 counsel regarding Defendants' motion to compel and the declarations filed in support of
 13 Defendants' motion to impose sanctions is excessive. With respect to Defendants' motion
 14 to compel, Attorney Heine asserts that he spent approximately 1.9 hours conferring with
 15 co-counsel. (ECF No. 48 at-1 at 3.) On the other hand, Attorneys Conte and Kurnick
 16 respectively reported spending 0.1 hour and 0.4 hour doing the same. (ECF Nos. 46 at 2;
 17 47-2 at 2.) Similarly, with respect to the attorney declarations, Attorney Heine asserts that
 18 he spent approximately 2.25 hours conferring with co-counsel (ECF No. 48-1 at 3-4),
 19 whereas Attorneys Conte and Kurnick respectively reported spending no time and 0.2 hour
 20 doing the same (ECF Nos. 46; 47-4 at 2). In light of Attorneys Conte's and Kurnick's
 21 representations, the time Attorney Heine spent conferring with co-counsel is excessive.
 22 The Court concludes it was reasonable for Attorney Heine to have conferred with co-
 23 counsel for 0.5 hour on Defendants' motion to compel and for 0.5 hour on the declarations
 24 filed in support of Defendants' motion to impose sanctions.

25 Fourth, the Court concludes that the 1.25 hours of work Attorney Heine performed
 26 on August 9, 2015 [sic] must be excluded from a Rule 37(a) award of attorney's fees.
 27 Exhibit A to Attorney Heine's declaration reflects that Attorney Heine spent 1.25 hours
 28 "[d]raft[ing] Heine declaration in support of motion for sanctions; review[ing] file re San

1 Diego Convention Center case.” (ECF No. 48-1 at 4.) Because there is no indication that
 2 the San Diego Convention Center case is related to the present case, and because the Court
 3 has no means of deciphering what portion of the 1.25 hours relates only to the time
 4 Attorney Heine spent drafting his declaration, the Court declines to award any of the fees
 5 associated with this billing entry.

6 In sum, the Court finds it was reasonable for Attorney Heine to have spent 6.8 hours
 7 on tasks related to Defendants’ motion to compel and motion to impose sanctions.
 8 Accordingly, the Court finds reasonable an award to Attorney Heine of \$1,530.00 in
 9 incurred fees.

10 **C. Other Factors Warrant a Further Reduction of Defendants’ Attorneys’
 11 Fees**

12 As discussed above, Federal Rule of Civil Procedure 37 recognizes various
 13 exceptions to awarding a moving party’s attorneys’ fees, such as where “other
 14 circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(a)(5)(A)(iii).
 15 Because Plaintiff is currently proceeding *pro se* and because he represented to the Court
 16 during the August 23, 2016 show cause hearing that he is indigent, pursuant to factor (iii)
 17 under Rule 37(a)(5)(A), the Court declines to impose on Plaintiff the full amount of
 18 reasonable sanctions sought by Defendants. The Court finds that \$2,176.66, one-half of
 19 Defendants’ reasonable attorneys’ fees and expenses, is an appropriate sanction. In
 20 addition, the payment of sanctions shall be deferred pending the outcome of this case. If
 21 there is a settlement in Plaintiff’s favor or Plaintiff is awarded damages, the sanction of
 22 \$2,176.66 will be immediately deducted from the settlement amount or damages award
 23 and paid to Defendants. If Plaintiff does not obtain a favorable settlement or damages
 24 award in this case, the sanctions award will be vacated.

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1 **III. CONCLUSION**

2 For the reasons discussed above, Defendants' motion to impose sanctions is
 3 **GRANTED in part.** The Court concludes that the following attorneys' fees and expenses
 4 were reasonably incurred by Defendants in making their motion to compel Plaintiff's initial
 5 disclosures.

6 Attorney	7 Fees	8 Expenses	9 Total Award
Conte	\$135.00	-	\$135.00
Kurnick	\$2667.25	\$21.07	\$2,688.32
Heine	\$1,530.00	-	\$1,530.00
Total Award			\$4353.32

10 However, pursuant to factor (iii) of Rule 37(a)(5)(A), Plaintiff shall pay Defendants a total
 11 of \$2,176.66, and only if later there is a settlement in Plaintiff's favor or Plaintiff is awarded
 12 damages in this case.

13 **IT IS SO ORDERED.**

14 Dated: October 27, 2016


 15 Hon. Jill L. Burkhardt
 16 United States Magistrate Judge

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